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IN THE

Supreme Court of the United States

October Term, 1980

PHILIP T. MEDICO,

Petitioner

v.

TIME, INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court should allocate its resources to review a United States Court of Appeals decision which interpreted state law, which decided no constitutional issue, and which does not conflict with any decision of any other court.

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Respondent Time Incorporated ("Time") opposes the Petition for Writ of Certiorari filed by petitioner Philip T. Medico. The petitioner has presented no special or important reasons for the granting of the writ. The decision he wishes the Court to review was squarely based upon a common law privilege which exists under the law of Pennsylvania. No question of constitutional magnitude is presented, and there is no conflict between federal courts of appeals respecting the matters decided by the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 643 F.2d 134 (3d Cir. 1981). That Court's order denying rehearing and rehearing *en banc* is mentioned at 643 F.2d 134, but is not officially reported as such.

The opinion of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of Time Incorporated is reported at 509 F. Supp. 268 (E.D. Pa. 1980). The previous opinion of the district court, denying Time's initial motion for summary judgment without prejudice to renewal of the motion, is not reported.

In all other respects, Time is satisfied with the petitioner's presentation of the opinions below.

JURISDICTION

Time is satisfied with the petitioner's presentation regarding the jurisdiction of this Court.

CONSTITUTIONAL PROVISION WHICH THE PETITIONER ALLEGES IS INVOLVED

The petitioner maintains on page 2 of the Petition that the First Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment, is involved in this case. For the reasons set out below, Time disagrees. The basis for the decision of the Court of Appeals was a common law privilege existing under the law of Pennsylvania, and no constitutional question is presented by this case in its present posture.

STATEMENT OF THE CASE

This is a libel action which the petitioner filed in the United States District Court for the Eastern District of Pennsylvania on the basis of that court's diversity jurisdiction. Both the parties and the two courts below have applied Pennsylvania law to the dispute.

The petitioner alleged that he was injured by a small portion of a full-page article appearing in the March 6, 1978 issue of Time Magazine. Time had reported in that article on various official investigations of then-Congressman Daniel J. Flood of Pennsylvania. One segment of the article identified three specific situations that were being reviewed by government officials; the first of the three concerned potential links between Flood and Russell Bufalino, and it contained the statement on which Medico based his claim. That paragraph of the article, read in its entirety, is as follows:

> Among the matters under scrutiny:
>
> —Ties between Flood and Pennsylvania Rackets Boss Russell Bufalino. The suspected link: the Wilkes-Barre

> firm of Medico Industries, controlled by President Philip Medico and his brothers. The FBI discovered more than a decade ago that Flood steered Government business to the Medicos and traveled often on their company jet. Investigators say Bufalino frequently visited the Medico offices; agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family. Elko's testimony has sparked new investigative interest in the Flood-Medico-Bufalino triangle.

Only fourteen words in that paragraph—"agents tape-recorded Bufalino's description of Philip as a *capo* (chief) in his Mafia family"—have been challenged by Medico in this litigation.

Time initially moved for summary judgment in June 1979, asserting that the words in question were substantially true and that truth is a complete defense under the law of Pennsylvania. In support of its motion, it submitted two official documents generated by the Federal Bureau of Investigation and an affidavit explaining the documents. The district court ruled in August 1979 that the affidavit submitted by Time was insufficient to authenticate the FBI records. It accordingly denied Time's motion, but without prejudice to its renewal if Time could obtain more complete affidavits. Appendix to Petition, at A38-A44.

In January 1980, Time once again moved for summary judgment, again on the state-law defense that the publication was true. Two new affidavits were presented, along with the same two FBI documents utilized by Time in connection with its initial motion for summary judgment. As he had in response to the first motion, the petitioner filed an affidavit which he believed was sufficient to cause the motion to be denied.

Upon its review of the record, the district court granted Time's renewed motion in June 1980. 509 F. Supp. 268 (E.D. Pa. 1980); Appendix to Petition, at A45-A71. Its ruling was not based upon the substantial truth of the publication, but rather upon the ground that the publication was privileged under section 611 of the *Restatement (Second) of Torts*, which furnishes a privilege to reports of official actions such as the FBI reports submitted by Time. Section 611 provides:

> *Report of Official Proceeding or Public Meeting*
>
> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

The section 611 privilege is a state-law doctrine. "The privilege contained in section 611 thus should be regarded as the law of Pennsylvania, which this court is bound to follow in this diversity libel action." 509 F. Supp. at 272; Appendix to Petition, at A52.

On appeal, the Court of Appeals for the Third Circuit affirmed. 643 F.2d 134 (3d Cir. 1981); Appendix to Petition, at A1-A30. It approached the case from the same perspective as the district court had in its second opinion, ruling that the section 611 privilege would be adopted by a Pennsylvania court if the case had been brought in state court rather than in federal court under the diversity jurisdiction. "We believe it appropriate to accept as the law of Pennsylvania the version of the fair report privilege embodied in the current *Restatement*." 643 F.2d at 138; Appendix to Petition, at A10-A11 (footnote omitted). Following an extended analysis of the elements of the section 611 privilege and of their ap-

plicability to the facts of this case, the court concluded that the privilege protects the publication which the petitioner has challenged. "We conclude that Time's publication of an allegedly defamatory article concerning Philip Medico falls within the scope of the Pennsylvania common law privilege of fair report, and that Medico has failed to establish a genuine issue of fact concerning a possible abuse of the privilege." *Id.* at 147; Appendix to Petition, at A29-A30.

The court of appeals was quite clear throughout its opinion that the basis of its decision was Pennsylvania law. In addition to the conclusive statements quoted in the preceding paragraph, the court repeatedly relied upon decisions of Pennsylvania courts and of federal district courts which had construed Pennsylvania law. *See, e.g., id.* at 139-40; Appendix to Petition, at A13-A15.

After a thorough discussion of the policies underlying the common law privilege, the court referred to certain constitutional concerns. But it reached no holding on such issues; it only adverted to them as aids to its interpretation of Pennsylvania law. The court stated that constitutional values only "help resolve the present dispute" and "reinforc[e] our prediction that Pennsylvania would, as a matter of common law, apply the fair report privilege to Time's publication about Medico." *Id.* at 143; Appendix to Petition, at A20, A21. Even more explicitly, the court of appeals provided the following limitation on the scope of its decision:

> We are careful to point out that we *do not decide* at this time that the First Amendment immunizes a newspaper's republication of a defamation arising in connection with a matter of public interest, and originally authored by a government source.

Id. at 145; Appendix to Petition, at A26 (emphasis added).

SUMMARY OF ARGUMENT

This case does not present major questions of public importance. The decision which the petitioner has asked this Court to review was based upon the common law of Pennsylvania. Contrary to the petitioner's assertions, no question of constitutional magnitude is presented, and there is no conflict among the circuits on the issues which are properly presented by this case.

ARGUMENT

The petitioner has attempted to offer two separate reasons for the granting of the writ: that an important constitutional issue was decided by the court of appeals, and that its decision supposedly conflicts with decisions previously reached by the Courts of Appeals for the Second Circuit and for the Tenth Circuit.

The petitioner has misstated the basis of the court of appeals' decision. As demonstrated above, it was squarely grounded in state law, and no constitutional issue was decided. The petitioner is simply incorrect in his first argument, on pages 9 through 14 of his Petition, that the only "reasonable and meaningful" basis for the decision reached by the court of appeals was the constitutional privilege of neutral reportage. His path to that conclusion is tortured and wholly inconsistent with the court of appeals' decision. The court's references to constitutional principles were made only because they provided further guidance to a federal court in the process of determining how to construe a state-law doctrine—not because the court was determining an issue of constitutional law.

Contrary to the petitioner's argument, then, no constitutional issue is presented. *Cf. Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). It would thus be inappropriate for the Court to grant certiorari in this case. Even if a constitutional question were in the background of the case in its present posture, it could not be reached unless the state-law issue were first addressed and resolved against Time. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

The petitioner's second argument, which appears on pages 15 and 16 of the Petition, is built upon his first. He seems to assert that because he believes that the Third Circuit has recognized the constitutional doctrine of neutral reportage (his first point), there is now a conflict among the decision in this case, the Third Circuit's own earlier decision in *Dickey v. CBS Inc.*, 583 F.2d 1221 (3d Cir. 1978), and the decisions in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied* and *Dixson v. Newsweek, Inc.*, 562 F.2d 626 (10th Cir. 1977). But because the court of appeals did not reach its decision on the basis of the doctrine of neutral reportage, no conflict among the courts of appeals can possibly be presented by this case. Even if it could be said that the court had reached the neutral reportage issue, its position would be consistent with *Edwards* and *Dixson* and not inconsistent with *Dickey*. *Dickey* was decided on a question of burden of proof and it never reached the neutral reportage privilege except in dicta.

CONCLUSION

There are no special or important reasons to grant the writ in this case. For all of the reasons set out above, Time urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 24, 1981

APPENDIX: Listing Prescribed by Rule 28.1 of the Rules of the Supreme Court of the United States

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent Time Incorporated, a corporation, identifies the following parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates:

American Cablevision of Fairfax, Inc.
American Cablevision of Indianapolis, Inc.
American Cablevision of Kansas City, Inc.
American Cablevision of Minneapolis, Inc.
American Cablevision of Pennsylvania, Inc.
American Cablevision of Philadelphia, Inc.
American Cablevision of St. Louis City, Inc.
American Cablevision of Wisconsin, Inc. ("ACW")

ACW Subsidiaries (partnerships)
Lakeside Cablevision
New Berlin Cablevision
Southwest Cablevision

American Heritage Cablevision, Inc.
Area Communications, Inc. of Florida
Center City Cablevision, Inc.
ATC Cablevision of Bellflower, Inc.
ATC Cablevision of Burlingame, Inc.
ATC Cablevision of East San Fernando Valley, Inc.
ATC Cablevision of Pasadena, Inc.
ATC Cablevision of San Gabriel, Inc.
ATC Cablevision of San Marino, Inc.
ATC Cablevision of Santa Ana, Inc.
American Television of Midwest City, Inc.
ATC Cablevision of South Pasadena, Inc.
Bartlesville Video, Inc.

Birmingham Cable Communications, Inc.
Cablevision of Durham, Inc.
Century Venture Corporation
Century-Colorado Corporation
Colorado Springs Cablevision, Inc.
Continental Cablevision of Richmond, Inc. of Virginia
Champaign-Urbana Communications, Inc.
Erie Telecommunications, Inc.
Frontier Cablevision, Inc.
Hawkeye Cablevision, Inc.
Honolulu Television and Communications Corporation
Inverness/ATC Joint Venture
Lakeshore Cablevision of Wisconsin, Inc.
Laurel Cablevision, Inc.
Memphis CATV Inc. of Tennessee
Mile Hi Cablevision, Inc.
Muscatine Television and Communications Corporation
New England Subscription T.V.
N. E. W. Media, Inc.
Norman Cable TV, Inc.
Lower Bucks Cablevision, Inc.
Private Channel Club of Miami
Public Cable Company
Sandhill Community Antenna Corporation
Select TV of California, Inc.
Subscription Television of Texas
Three Rivers Cablevision, Inc.
Tucson Cablevision, Inc.
Vista Cablevision, Inc.
West Allis Cablevision, Inc. of Wisconsin
Wolverine Cablevision, Inc.

Inland Container Corporation ("ICC")

ICC Subsidiaries

Georgia Kraft Company
JLW III

Temple-Eastex Incorporated ("T-EI")

T-EI Subsidiaries

Security & Guaranty Abstract Company
Temple-White Company, Inc.